

*United States Court of Appeals
for the
District of Columbia Circuit*



**TRANSCRIPT OF
RECORD**

271

BRIEF FOR APPELLANT

In the
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 24,908

UNITED STATES OF AMERICA

Appellee,

v.

RONALD B. JAMES

Appellant.

Appeal from Judgment of United States
District Court for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED MAR 2 1971

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Statement of Issues Presented

1. The first question is whether the Court properly denied Defendant's motion to suppress as evidence a gun and box of cartridges, found after the police halted the car in which he was a passenger.
2. The second question is whether the Court properly reflected Defendant's motion for judgement of acquittal based upon self-defense.
3. The third question is whether the Court erred in finding that the Defendant has been carrying a gun within the meaning of the Statute.

The pending case has not been been before this Court previously.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 24,908

United States of America, Appellee

v.

Ronald B. James, Appellant

Appeal from Judgment of United States
District Court for the District of Columbia

BRIEF FOR APPELLANT

Jurisdictional Statement

Appellant was indicted and convicted in the United States District Court for The District of Columbia of the offenses of assault with a dangerous weapon and carrying a dangerous weapon (22 D.C. Code 502 and 3204), and was sentenced on November 13, 1970, to imprisonment for a period of two to six years. Appellant timely filed a Notice of Appeal. Jurisdiction is conferred upon this Court by Section 1291, Title 28, of the U.S. Code, as amended October 31, 1951, c. 655, 65 Stat. 726; July 7, 1958, 72 Stat. 348, U.S.C.A., Title 28, §1291.

References to Parties and Rulings

The basis of the judgment presented for review by this Court is set forth on pages 31-32 and 39 of the transcript of the proceedings of the Court below.

Statement of Case

The indictment in two counts charges Defendant with assault with a dangerous weapon and carrying a dangerous weapon. The Court tried the case without jury, and found Defendant guilty on both counts. Defendant moved to suppress a gun and a box of cartridges found in the car in which Defendant had been riding at the time of arrest. This motion was denied in Court (Tr. 31). Defendant raised a claim of self-defense which was rejected by the Court below (Tr. 32).

The Testimony

Officer Hugh Triggs, the complaining witness, testified that he and Officer Likeout had received information from an informer that narcotics were going to be sold at 1006 Massachusetts Avenue, N.W., in the District of Columbia. At 2:30 in the afternoon on February 7, 1970, they were parked across the street from that location in an unmarked police car in plain clothes. (Tr. 6). Officer Triggs saw the Defendant and his brother exit from the

building at that address at about 2:45 and enter a car which had been parked outside. (Tr. 2). The Defendant, as passenger, and his brother, as driver, drove away, followed by the unmarked car. (Tr. 8). Several blocks away the officers stopped the car. The precise circumstances and chronology of all that happened thereafter are not clear in the record. The officers admitted that everything occurred very fast. Thus, Officer Triggs did not know whether he opened the door before yanking the Defendant from the car. (Tr. 10). He did not know if the window on the passenger's side of the car was open. (Tr. 15, 16). He testified that the officers identified themselves (Tr. 9), and that the Defendant "evidently" saw his proffered identification (Tr. 15). Officer Triggs, at the passenger's side of the vehicle, was warned by his partner that the Defendant had a gun and Officer Triggs pulled the Defendant from the car. (Tr. 9). Upon the warning by his fellow officer, Officer Triggs stopped to place his identification folder and badge in his pocket before dealing with Defendant (Tr. 15). The gun was taken from the seat, together with a box of cartridges also found in the car, and the Defendant and his brother were arrested. (Tr. 9-13) Officer Triggs indicated to the Court how the gun was held by the Defendant by means of demonstration. From the testimony it appears that he demonstrated that the gun was held down close to the seat, near the Defendant's leg, tilted towards the witness "a little". (Tr. 17).

Officer Likeout testified that he had been "assigned to observe a Yellow Taxi-cab parked on the lawn in front of" the address

in question, on the basis of a tip from an informer that "two subjects would be getting into a cab coming out of 1006 Massachusetts, and they would be carrying a large quantity of narcotics." (Tr. 18-19). On questioning by the Court, he stated that the informer had never given him any other information, but that the informer's previous reports in unspecified cases to unspecified persons had proven accurate "To the best of my knowledge" (Tr. 26-27). The nature of his "knowledge" was not disclosed. The gun and cartridges were introduced into evidence as Exhibits 1 and 2, respectively, over the objection of Defendant. (Tr. 32). The Court dismissed the Defendant's request for judgment of acquittal based upon self-defense. The Court, in response to the argument that Defendant had a right to resist the halting of the car in which he was riding and the approach and entry of two strangers, held that "he doesn't have any right, one, to have a pistol with him. In the second place, he hasn't got a right to go pointing it at somebody." (Tr. 32).

The Defendant, testifying in his own behalf, stated that he had exited 1004 rather than 1006 Massachusetts Avenue, before entering the cab, which was owned by Defendant's brother. (Tr. 35, 36). He stated that the gun belonged to an older brother, and was wedged into the crack of the front seat, and denied that he had held the gun at all. (Tr. 33-34, 36-37). He stated that the charge of assault with a dangerous weapon was not made until he refused to supply the names of any drug dealers to a detective at the precinct.

(Tr. 34). No drugs and nothing pertaining to drugs were found in the cab. (Tr. 35). The Court found the Defendant guilty on both counts, and sentenced him to imprisonment for two to six years.

Summary of Argument

The stopping of the car in which defendant was riding, by two plainclothes police officers in an unmarked car, was an arrest and was supported by neither warrant nor probable cause. The testimony indicates that the car was accosted solely on the basis of an informer's tip, which was insufficient to support the stopping. The prosecution did not fulfill its burden below to adduce testimony indicating specifically what the informer said and what prompted the police to credit the information. The circumstances necessary to justify a "stop" under the stop and frisk rulings were not present here. The stopping of the car was not based upon the judgment of policemen after suspicion of activities on the street. Rather, it was based solely on the uncorroborated information given by the unidentified informer.

The motion for judgment of acquittal based on self-defense entered by Defendant was improperly rejected. The first reason given for overruling this plea was that the Defendant did not have any right to have a gun with him. This reason does not logically relate to the question of self-defense which is a factual one. The second reason given for overruling this motion was that the Defendant did not have the right to point the gun at anyone. This reason expresses merely a conclusion as to the merits of the plea which clearly does not take into consideration the factual circumstances present at the time of the incident.

The trial testimony does not support a finding that the Defendant was carrying a gun within the meaning of the statute. His uncontested testimony was that the gun was owned by another person. There is no testimony that he carried the gun to the car, which was owned by Defendant's brother, or that he had been in the car previously. Defendant testified that he had not held the gun at all. Even if the testimony of the two officers is accredited, one who uses a weapon is not violating the statute which prohibits the carrying of an unlicensed gun while he is using it in self-defense.

ARGUMENT

- I. The Court below improperly denied Defendant's Motion to suppress as evidence the gun recovered from the seat of the car and the box of cartridges found in the search of the car. The halting of the car by the police was improper and was in violation of Defendant's Fourth Amendment right to be secure against unreasonable seizure.

With respect to Point I, Defendant desires the Court to read the following: Tr. 6, 18-19, 26-29, 31, 35.

It is settled law that in the absence of probable cause for believing a vehicle is carrying contraband, police may not stop or interrupt the travel of persons in automobiles on the nation's highways. Clay v. United States, 239 F 2d 196 (CA 5, 1956). Cf. Brinegar v. United States, 338 U.S. 160, 177 (1948). In the Clay case, federal agents, acting on information concerning the reputation and prior conviction of the defendant on a gambling charge, forced a vehicle he was operating to the side of the road and searched both his person and the automobile. They stopped him at a place where he habitually passed in his daily movements. The court stated that "there was nothing to indicate that procuring warrants of arrests or search would thwart, or impede the efficient enforcement of law, or intrude upon the judgment of the officers as to when to close the trap." Id. at 204. The circumstances of the

instant case appear to have allowed sufficient opportunity to attempt to secure and to execute a warrant without unduly risking the loss of any contraband believed to be contained in the car.

In this case, the gun, recovered from the front seat of the automobile and the cartridges, found in a search of the automobile, were crucial pieces of evidence in establishing Defendant's guilt. Their admission into evidence over Defendant's objection was improper and highly prejudicial. Officer Triggs testified that an informant had said that a narcotics "sell and passing" was going to occur at a specified address (Tr. 6) and that the officers were keeping that location under surveillance. Officer Likeout testified that he was "assigned to observe a Yellow Taxi-cab parked on the lawn in front of" that address (Tr. 18), and that the informer had said that two people would come out of the building with narcotics and enter a cab (Tr. 19). Although the defendant testified that he had been in an adjoining building (Tr. 35), the officers contended that he exited from the building under surveillance. He and his brother got into a cab and drove away. The policemen, in plain clothes and in an unmarked car, followed the cab for a few blocks and then stopped it. Whether viewed as an arrest or as a "stop and frisk", the stopping of the car was illegal.

The car was halted solely on the suspicion that it might contain narcotics. There was no testimony or contention that this was a routine stop to check license and registration under the government's administrative powers. Although Officer Likeout did

ask for license and registration, it is obvious that these were formalities and unrelated to the fundamental purpose of the stopping. The immediate command to the driver to get out of the car, the fact that this vehicle was chosen to be stopped on the basis of information concerning narcotics, and the fact that these were undercover policemen, negate any inference that the purpose of the stop was related to the right of the police to check registration. There was no testimony that the driver or the vehicle was involved in any infraction of the motor vehicle laws, nor was there any testimony that the police officers had observed the driver or passengers of the car committing any illegal act. There was not probable cause for this arrest, and there is no indication that the circumstances did not permit application for a warrant. "The term arrest may be applied to any case where a person is taken into custody or restrained of his full liberty, or where the detention of a person in custody is continued for even a short period of time." Morton v. United States, 79 U.S. App. D.C. 329, 147 F 2d 28, 30 (1945); Long v. Ansell, 63 App. D.C. 68, 69 F 2d 386 (1934); Henry v. U.S., 361 U.S. 98, 103 (1959). Here the defendant and his brother were restricted in their mobility, and every indication is that the officers stopped them with the intent to detain them while they looked for narcotics.

If a search warrant had been sought on the basis of the information of the informer, it could not have been granted under the guidelines of the courts. Few facts concerning this informer

were adduced at trial. Aside from conclusionary statements that he was "reliable", the evidence shows only that he predicted a narcotics "sell and passing" (Tr. 6), and had predicted that two people would be coming out of a certain building and getting into a cab while carrying a large quantity of narcotics. (Tr. 18-19). He had never given Officer Likeout any other information. He was not paid, although he had made "buys" for the Police Department. (Tr. 26). To the "best of the knowledge" of Officer Likeout, the informer's previous reports had proven accurate (Tr. 26-27), but the nature of his "knowledge" was not disclosed. The facts of record thus fall far short of establishing the reliability or creditability of the informer.

In a landmark case, a state search warrant issued on the basis of an affidavit which recited, in relevant part:

Affiants have received reliable information from a credible person and do believe that heroin, marijuana, barbituates, and other narcotics and narcotic paraphernalia are being kept at the above described premises for the purpose of sale and use contrary to the provisions of the law.

was found invalid, because the affidavit did not provide a sufficient basis for a finding of probable cause, and consequently the evidence obtained as a result was inadmissible. Aguilar v. Texas, 378 U.S. 108 (1964); Spinelli v. United States, 393 U.S. 410 (1969). The Supreme Court stated in the former case that:

the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed

they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, (citation omitted), was "credible" or his information "reliable". Id. at 114.

The facts of the present case fail to satisfy the standards of the Aguilar case.

It is well established that evidence sufficient to support a magistrate's disinterested determination to issue a warrant will not necessarily justify the police to proceed without a warrant; the standard of probable cause is higher for the police acting without the judicial imprimatur. Johnson v. United States, 333 U.S. 10, 14, (1948); Jones v. United States, 362 U.S. 257, 270, (1960); Aguilar v. Texas, supra., at 110. Here the scanty information presented at trial about the informer certainly would not justify a warrant.

In a case of a warrantless arrest, based on the communication of an informer combined with the officer's personal knowledge of the defendant and of his criminal record, the Supreme Court, in finding no probable cause, held that "when the constitutional validity of an arrest is challenged, it is the function of the court to determine whether the facts available to the officers at the moment of arrest would warrant a man of reasonable caution in the belief that an offense had been committed. If the court is not informed of the facts upon which the arresting officers acted, it cannot properly function." Beck v. Ohio, 379 U.S. 89, 96 (1964). When the consti-

tutional validity of the arrest is challenged, it is incumbent upon the prosecution to show with some degree of specificity "what the informer actually said, and why the officer thought the information was credible." Id. at 97. No such showing was made here.

This case should not be viewed as an incidence of "stop and frisk" (Tr. 28, 29, 31). The testimony that the officers were "assigned" to stake out the cab indicates that the stopping was not within the rules which have been recently developed concerning street encounters. Terry v. Ohio, 392 U.S. 1, (1968). It was carried out after advance determination by the police authorities to observe the cab. The officers added nothing to their suspicions by surveillance. The facts here do not fall into that gray area where a police officer has suspicions which reasonably require him as a prudent man to stop and interrogate a person, and yet does not have probable cause to arrest. Here there was advance knowledge of the situation. Neither officer was an eye-witness to unusual or suspicious activity, as the policeman was in Terry. This was a stake out by two plain-clothes officers, rather than an observation on the street by a lone patrolman who had to make an immediate decision. The officer's only basis for believing that James may have been committing a crime was the alleged tip from the unnamed and unaccredited informer. Moreover, the intervention here was not required to prevent serious violence, as in Terry, but rather to establish the possession of contraband. Nothing suggests that the officers could not have kept the James' car under further surveillance if they believed that further investigation

was called for on the sole basis of the informer's tip.

Thus, viewing the halting of the car as either an arrest or a "stop", it was illegal, and the gun and the cartridges seized during the search of the car should not have been admitted into evidence. Absent these items of evidence, the government's case on both counts is fatally defective.

II. The Court improperly rejected Defendant's motion for judgment of acquittal based upon self-defense.

With respect to Point II, Defendant desires the Court to read the following: Tr. 30, 31-32, 9, 17, 22.

At the conclusion of the prosecution's case, counsel for the Defendant moved for judgment of acquittal (Tr. 30). In the course of argument on the motion, the following took place: (Tr. 31-32)

MR. RESPESS: We also have the problem in the case of the police officer as to whether or not the defendant knew this was a police officer.

MR. HOFFMAN: He is not charged with assault on a police officer. He is charged with an assault with a dangerous weapon.

THE COURT: He is not charged with assault on a police officer.

MR. RESPESS: Certainly if somebody else other than a police officer is trying to stop him and enter his taxi-cab, he would have the right to resist that.

THE COURT: He might have a right to resist it, but he doesn't have any right, one, to have a pistol with him. In the second place he hasn't got a right to go pointing it at somebody.

The Court's rejection of this claim of self-defense and the right to resist unknown strangers was erroneous.

The right of the Defendant to have the gun with him, as stressed by the Court, is not logically relevant to the issue of whether Defendant's holding of it was in self-defense. Further, his right to "point it", also stressed by the Court, could not logically have been denied without a consideration of the facts of the case. The Court ruled that the holding and pointing of the gun without more constituted illegal conduct per se.

The car in which the Defendant was riding was halted by two men in ordinary clothes and in an unmarked car. Under these threatening circumstances, it was defensible conduct for Defendant to rely upon any available means at hand to ward off the danger. There is no doubt that one who believes that he is being assailed may defend himself. One who is attacked may repel the attack with whatever force he reasonably believes is necessary under the circumstances, if he did not provoke a fight. Harris v. United States, 124 U.S. App. D.C. 308, 264 F 2d 701 (1966).

In this case Officer Triggs testified that Officer Likeout, at the driver's side of the car, yelled to him that the Defendant had a gun pointed in his direction. He immediately dragged the passenger from the car, but the gun was recovered from the seat. When asked if he saw the gun pointed at him, he answered "I saw the gun, sir." (Tr. 9). He later testified that the gun was "down

close to the seat near his leg," and "tilted toward me a little". (Tr. 17). Officer Likeout, who testified that he yelled the warning from four to five feet away, testified that James picked up the gun from the seat and pointed it "towards" Officer Triggs. (Tr. 22). The foregoing evidence establishes that the Defendant at the time was exercising reasonable and prudent self-defense against the aggressive approach of two strangers, rather than committing an assault.

The claim of self-defense here is buttressed by the questionable testimony of the officers concerning their identification to Defendant as police officers. The crucial events happened quickly, and the officers' recollections were hazy. The testimony of Officer Triggs that he stopped to put his badge and folder into his pocket before dealing with Defendant after being warned that he was armed is inherently incredible. Jackson v. United States, 122 U.S. App. D.C. 325, 353 F 2d 862, (1965). Moreover, it has been held that under 22 D.C. Code 3204, one is not guilty of carrying an unlicensed pistol during the period it is actually used in self-defense. Wilson v. United States, 91 U.S. App. D.C. 135, 198 F 2d 299, (1952).

III. The Court below erred in holding that the Defendant had been carrying a gun within the meaning of the Statute.

With respect to Point III, Defendant desires the Court to read the following: Tr. 7, 35, 36.

The evidence in this case does not reasonably support the conclusion that the Defendant was carrying a gun within the meaning

of the statute. Defendant testified that the gun belonged to an older brother (Tr. 35,36), not present at the time of the incident, and that it had been pushed down into the seat (Tr. 36). None of the evidence contradicted these statements. There was no evidence tending to prove that the Defendant carried a gun with him to the cab, nor that he had been in the cab previously (Tr. 7). The taxi cab did not belong to him. Thus there is no basis for a finding of constructive possession.

Here all of the evidence is consonant with a finding that he was circumstantially within access of the gun through no affirmative act of his own. This line of reasoning is equally applicable to the box of cartridges found in the ensuing search of the cab. There was no evidence to support a view that the gun was within Defendant's access other than by happenstance. Although a gun within access has been considered as being about the person in certain circumstances, this application of the statute is intended to encompass only a situation where it was the accused's gun or within his constructive possession due to ownership of the car. Hence, apart from the "carrying" implicit in Point II above, the foregoing circumstances clearly negate any finding that Defendant carried a gun in violation of the statute.



CONCLUSION

WHEREFORE, the premises considered, the conviction in the instant case should be reversed, and the case remanded to the Court below for entry of a judgment of acquittal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Nancy M. Cassady, a secretary in the offices of Schwartz & Woods, certify that I have on this 26th day of March, 1971, sent by First Class U.S. mail, postage prepaid, copies of the foregoing BRIEF FOR APPELLANT to the following:

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Nancy M. Cassady
Nancy M. Cassady

BRIEF FOR APPELLEE

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,908

UNITED STATES OF AMERICA, APPELLEE

v.

RONALD B. JAMES, APPELLANT

Appeal from the United States District Court
for the District of Columbia

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United States Attorney.

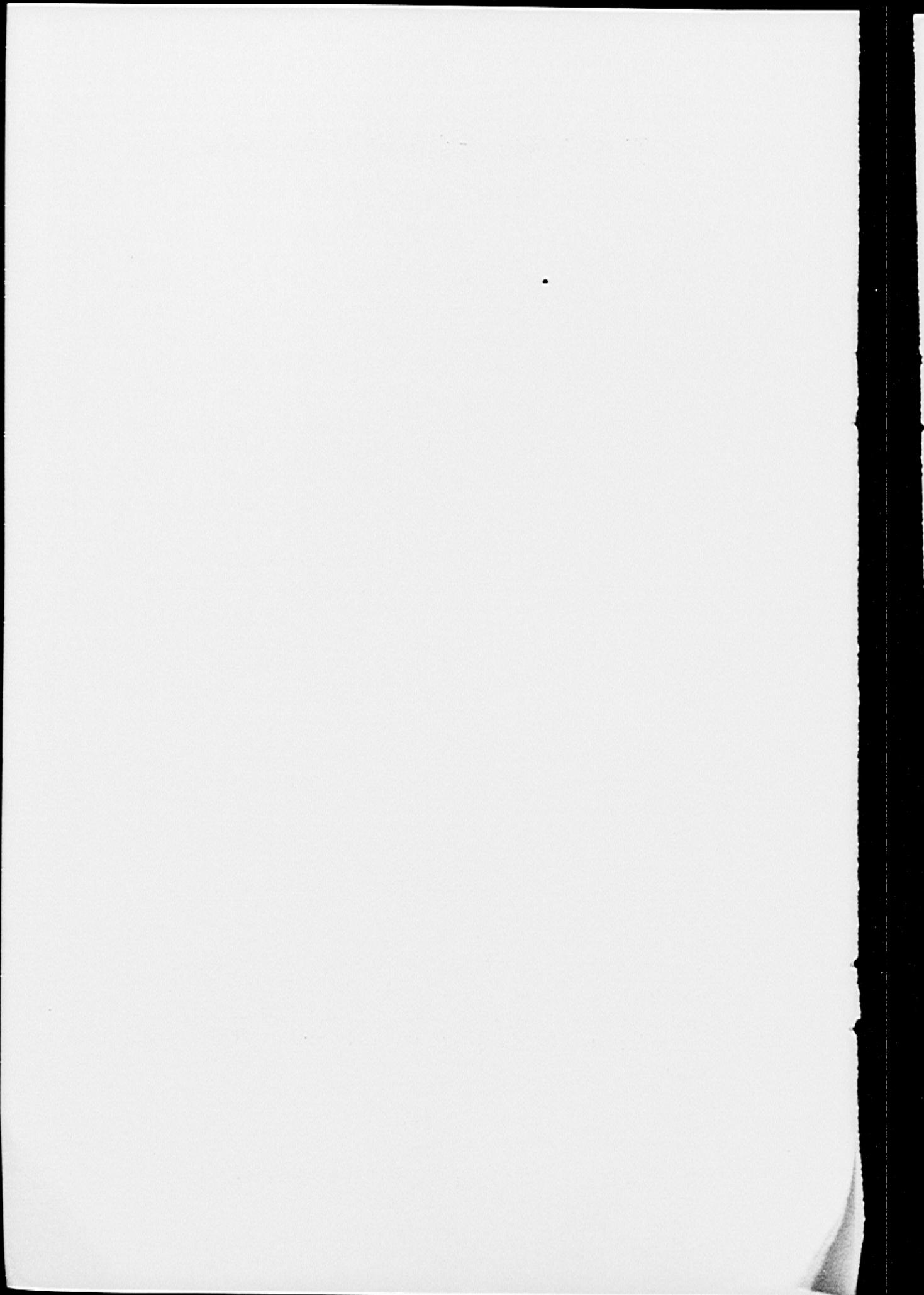
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United States Court of Appeals
for the District of Columbia Circuit

FILED JUNE 1 1971

Thomas J. Paulson



**United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 24,908

UNITED STATES OF AMERICA, APPELLEE

v.

RONALD B. JAMES, APPELLANT

**Appeal from the United States District Court
for the District of Columbia**

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

In a two-count indictment filed May 28, 1970, appellant was charged with assault with a dangerous weapon (22 D.C. Code § 502) and carrying a dangerous weapon after the conviction of a felony (22 D.C. Code § 3204). On August 27, 1970, after waiving trial by jury, appellant was tried before the Honorable George L. Hart, Jr., and was found guilty on both counts. On November 13, 1970, appellant was sentenced to concurrent terms of imprisonment for two to six years on each count. This appeal followed.

(1)

On a sunny February 7, 1970, at 2:30 p.m., plain-clothes Officers Hugh F. Triggs and Douglas C. Likeout of the Third District, Metropolitan Police, were seated in their unmarked police cruiser in a parking lot at the corner of Tenth Street and Massachusetts Avenue, N.W., watching an unoccupied Yellow cab with Maryland license plates parked on the lawn in front of 1006 Massachusetts Avenue (Tr. 6-7). Earlier they had received information from "a reliable informant that two subjects would be getting into a cab after leaving 1006 Massachusetts Avenue, N.W., and they would be carrying a large quantity of narcotics" (Tr. 6, 19).¹ Shortly before 2:45 p.m. the policemen saw appellant and his brother, Jerome Thomas James, exit from the above address and get into the car, the brother taking the wheel while appellant sat in the frontseat. The taxicab pulled out, headed west on Massachusetts Avenue, and turned right on Eleventh Street going north. The police followed the auto for about five minutes keeping it in view at all times (Tr. 8).

In the 1200 block of Eleventh Street the officers stopped the taxicab. Officer Likeout left the police cruiser first and approached the cab on the driver's side, asking Jerome James for his license and registration and requesting him to step out of the auto. Meanwhile Officer Triggs moved toward the front door on the passenger's side of the cab with his badge and police identification in his hand, stating to appellant that he was a policeman (Tr. 9, 14). As Jerome James, the driver, left the auto, Officer Likeout moved aside, but as he did so he observed appellant, less than five feet away and inside the cab, pick up a gun and point it at his unsuspecting partner. Immediately he cried out that appellant had a gun. Reacting, Triggs saw the gun through the open car window in appellant's left hand "down close to the seat near his leg" (Tr. 9, 17). He grabbed appellant and yanked him

¹ The informant had made previous "buys" for the police, and his previous reports had proved reliable (Tr. 26-27).

from the taxi as the gun fell to the car seat (Tr. 23). The gun proved to be fully loaded with "one in the chamber and five in the clip" (Tr. 23). A further search of the taxicab revealed under the passenger's seat a box of twenty-six .25 caliber, 6.35 millimeter cartridges for the weapon (Tr. 13).

Appellant admitted knowing that the gun was on the front seat of the cab, stuffed into the crack between the seats with only part of the handle protruding (Tr. 36). He denied ever pointing the gun at Officer Triggs, stating that the police decided to charge him because he refused to turn over names of people who "dealt with drugs in the area" (Tr. 34).

ARGUMENT

The seizure of the gun was proper.

(Tr. 6-27)

At trial, appellant unsuccessfully sought the suppression of a fully loaded pistol and a carton of .25 caliber cartridges. He renews that contention here, urging that the police should disregard reliable information which might come to them and neglect suspicious circumstances which would "warrant further investigation."² We find appellant's contention meritless.

The law is clear that brief on-the-street investigative detention will not constitute an arrest when such restraints are reasonably necessary to probe suspicious circumstances.³ Most recently, this Court in *Young v.*

² *Terry v. Ohio*, 392 U.S. 1, 22 (1968).

³ *Coleman v. United States*, 137 U.S. App. D.C. 48, 420 F.2d 616 (1969); *Allen v. United States*, 129 U.S. App. D.C. 61, 390 F.2d 476 (1968); *Bailey v. United States*, 128 U.S. App. D.C. 354, 364 n.9, 389 F.2d 305, 315 n.9 (1967) (concurring opinion of Leventhal, J.). See also *Dorsey v. United States*, 125 U.S. App. D.C. 355, 372 F.2d 928 (1967); *Brown v. United States*, 125 U.S. App. D.C. 43, 46 n.4, 365 F.2d 976, 979 n.4 (1966); *Green v. United States*, 104 U.S. App. D.C. 23, 259 F.2d 180 (1958), cert. denied, 359 U.S. 917 (1959).

*United States*⁴ reaffirmed the right of brief investigative detainment on less than probable cause. Judge Leventhal, speaking for the Court in *Young*, recognized the lack of probable cause to arrest in that particular case but went on to state that "the police nonetheless had reasonable cause for the stop the car and its occupants."⁵ The Court found firm support for this position of momentary investigative detention on less than probable cause in *Terry v. Ohio*⁶ and *Rios v. United States*.⁷ In *Coleman v. United States*,⁸ Judge Bazelon in a concurring opinion addressed himself to the issue of the right of the police on less than probable cause to stop a moving vehicle and ask questions: "The officers, then, had at least the right to stop appellants long enough to ask to talk to them, and I do not think they were required to make this request through the window of a moving vehicle."⁹

The conduct of the police was predicated upon information which, although it amounted to something less than probable cause to arrest, was certainly by any standard sufficient to justify the police in stopping the car and inquiring of its occupants. The information relayed by the informant to the police was of the most "suspicious" nature and created an undeniably "challenging situation."¹⁰ The nature of the informant's tip alone was sufficient to warrant surveillance of the building at 1006 Massachusetts Avenue. The informant was deemed reliable by both police officers because in the past he had bought narcotics and turned information con-

⁴ — U.S. App. D.C. —, 435 F.2d 405 (1970).

⁵ *Id.* at —, 435 F.2d at 408.

⁶ *Supra* note 2.

⁷ 364 U.S. 253 (1960).

⁸ *Supra* note 3.

⁹ 137 U.S. App. D.C. at 59, 420 F.2d at 627.

¹⁰ *Dorsey v. United States*, *supra* note 3, 125 U.S. App. D.C. at 358, 372 F.2d at 931. See also, *United States v. Wright*, D.C. Cir. No. 23,060, decided April 19, 1971, slip op. at 5.

cerning those "buys" over to the Narcotics Squad (Tr. 26). Other information that was turned over to the police had also proved to be accurate (Tr. 27). On the basis of the past reliability of the informant, the police certainly acted reasonably in staking out the named address. Then, when the police perceived facts from their observation point which corroborated the tip, Officer Triggs and Likeout had even more cause to investigate a "challenging situation" by stopping the car briefly and questioning the suspects. Failure to inquire in light of the confirmatory nature of the informant's prediction of the facts observed by the police would have amounted to dereliction of their law enforcement duties.¹¹

Corroboration of informant information immediately prior to the time of an arrest has been held sufficient for probable cause to sustain that arrest and search. *Draper v. United States*, 358 U.S. 307 (1959).¹² The narcotics agent in *Draper*, like Officers Triggs and Likeout in the instant case, proceeded to the site of the predicted criminal activity and, upon observing sufficient circumstances which confirmed the informant's tip, stopped, then arrested and searched the suspect.¹³ In appellant's case the significant difference is that the police did not search the vehicle; on the contrary, they stopped the cab only to make inquiry of its occupants, a fact borne out by Officer Likeout's request for the driver's license and registration. The fact that the driver was asked to step from the cab does not, in this case, mean that the police had any other intention but to ask questions of the occu-

¹¹ See *United States v. Frye*, 271 A.2d 788 (D.C. Ct. App. 1970).

¹² See *Smith v. United States*, 123 U.S. App. D.C. 202, 358 F.2d 833 (1966).

¹³ The United States Supreme Court recently commented on the applicability of *Draper* to corroboration of informant information:

This Court has held where the initial impetus for an arrest is an informer's tip, information gathered by the arresting officers can be used to sustain a finding of probable cause for an arrest that could not adequately be supported by the tip alone. *Whiteley v. Warden*, 91 S. Ct. 1031, 1036 (1971).

pants.¹⁴ Taking the word of the reliable informant, together with the subsequent corroboration of that relayed information, appellee submits that requisite cause existed for the police to stop the vehicle in which appellant was riding.¹⁵

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

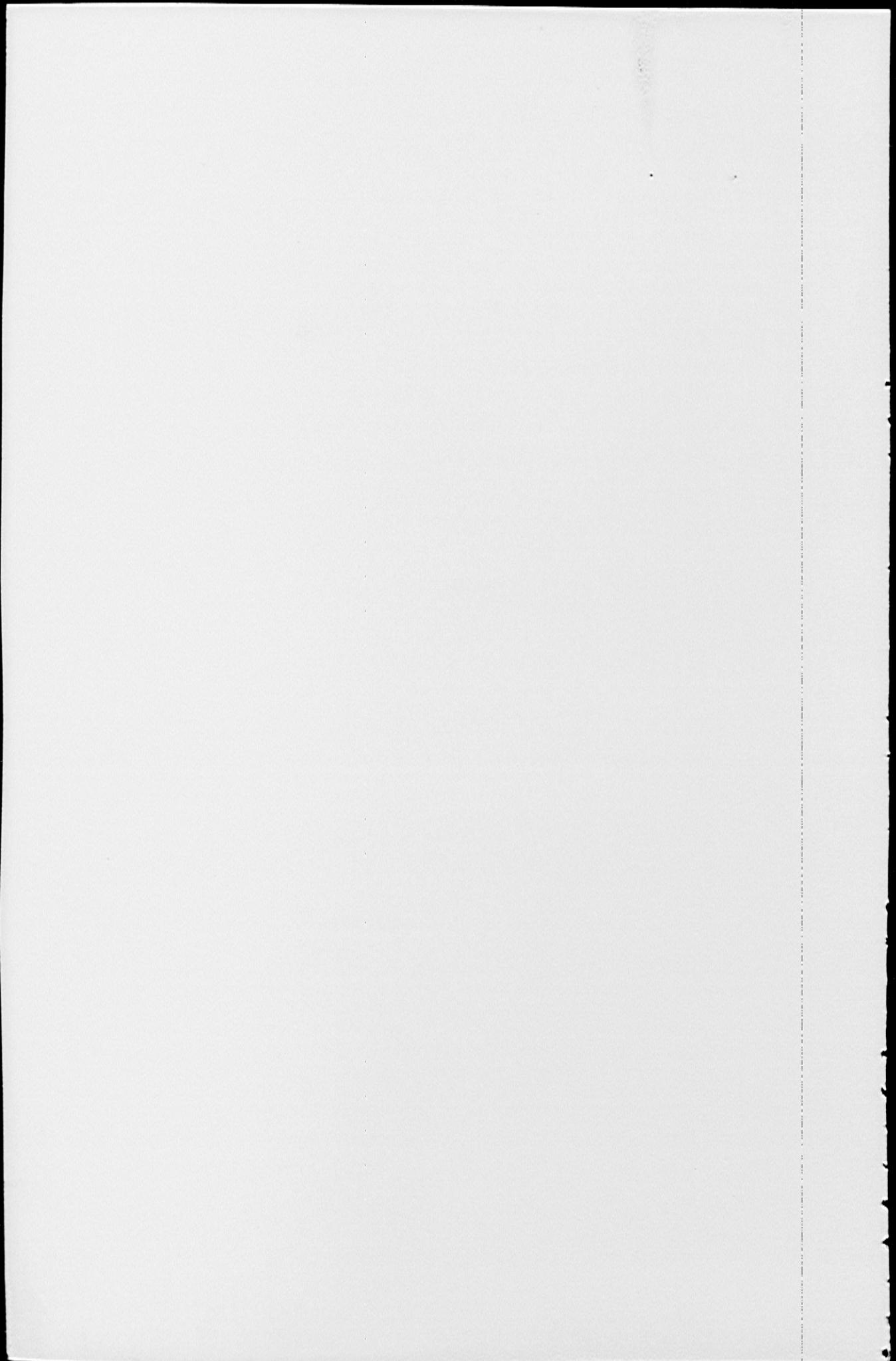
THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
HERBERT B. HOFFMAN,
JOHN E. DRURY, III,
Assistant United States Attorneys.

¹⁴ See *Allen v. United States*, *supra* note 3, 129 U.S. App. D.C. at 62, 390 F.2d at 477; cf. *United States v. Johnson*, D.C. Cir. No. 23,900, decided March 22, 1971.

¹⁵ We feel constrained to comment on appellant's argument that the evidence is insufficient to support a verdict of "carrying" a weapon within the meaning of the statute, 22 D.C. Code § 3204. Appellant overlooks his admission at trial that he knew the gun was present on the seat prior to the police stopping the vehicle (Tr. 36). Both police officers stated that they saw the gun in appellant's hand (Tr. 9, 22). The law in this jurisdiction strongly supports the guilty verdict that appellant was in possession of the weapon. *Epperson v. United States*, 125 U.S. App. D.C. 303, 371 F.2d 956 (1967); *Brown v. United States*, 58 App. D.C. 311, 30 F.2d 474 (1929); *Kenhan v. United States*, 263 A.2d 253 (D.C. Ct. App. 1970); *Waterstaat v. United States*, 252 A.2d 507 (D.C. Ct. App. 1969); *Powell v. United States*, 246 A.2d 641 (D.C. Ct. App. 1968).

Appellant's claim that the trial judge erroneously rejected his motion for judgment of acquittal based on self-defense is totally without merit since the record is barren of even a hint that self-defense was the reason appellant possessed the loaded weapon. In fact, appellant's defense was knowledgeable non-possession; that is, he said that he knew the gun was stuffed in the seat but denied ever holding it in his hand (Tr. 36).



REPLY BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 24,908

UNITED STATES OF AMERICA

Appellee

vs.

RONALD B. JAMES

Appellant

Appeal from Judgement of United States
District Court for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED JUN 1 1971

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

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Appeal from Judgement of United States
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REPLY BRIEF FOR APPELLANT

- I. The halting of the car by the police was
improper and violated Defendant's Fourth
amendment right to be secure against
unreasonable seizure.

Appellee concedes that the "conduct of the
police was predicated upon information which . . .
amounted to something less than probable cause to
1/
arrest" (App. Br. p. 4) Nevertheless, Appellee

1/ App. Br. denotes Appellee's typescript brief

argues (App. Br. pp. 3-6) that the police were justified in stopping the car and questioning its occupants and that subsequent events justified seizure of the gun and arrest of the defendant. Appellee's contentions are devoid of merit. In the first place, the stopping of the car and the demand to the driver that he step out of the car constituted an arrest - an arrest which concededly was not supported by probable cause. See in this connection

Young v. United States, ____ U.S. App. D.C. ___, 435 F.2d 405 (1970) cited in Appellee's Brief, p. 3, where this Court distinguished an arrest from a stop in terms of "whether the constraints applied were protective of the police and bystanders or were custodial," citing the concurring opinion in Bailey v. United States, 128 U.S. App. 2/
D.C. 354, 389 F.2d 305 (1967).

In any event, the detention in the instant circumstances was improper, whether or not an arrest, and the seizure of the gun illegal. Each case must be approached on a factual basis regarding the application of fourth amendment constitutional rights. Bailey v. United States, supra. The only information the police received came from an unidentified informant. Appellee states that "the information relayed by the informant to the police was of the most

2/ In the Bailey case the Government conceded that an arrest had occurred when the officer approached the vehicle and restricted mobility of the defendant.

suspicious nature" . . . (App. Br. pp. 4-5). However, the reliability of the informant herein was inadequately established. The officer who testified about the informant at trial had never received information from him before. (Tr. 26). He did not have personal knowledge of the accuracy of any previous reports to the police department by the informant. Nor was there any reliable corroboration of the tip as claimed by the Appellee. All that transpired was that two men left the building and drove off in a car.

The cases cited by Appellee are all substantially distinguishable on their facts from the instant case. In Coleman v. United States (App. Br. p. 3), the majority actually found probable cause for an arrest. Here, even the Government concedes lack of probable cause. In Allen v. United States (App. Br. p. 3), the stop was motivated by a car driven in the dark of night without its headlights on. No comparable motor vehicle violation was involved here. See also Brown v. United States (App. Br. p. 3). In Bailey v. United States (App. Br. p. 3) a brutal robbery had been committed and the persons detained fit closely the description of the robbers given to the police. As the Court noted in Bailey "The police here were obviously quite certain that they had the right men." Bailey case supra, 389 F.2d 305, 309.

Moreover, the Court in Bailey emphasized that "the emergency character of these arrests weighs heavily in determining their reasonableness" (ibid). In the instant case there was no description, there was no proven crime, and there was no emergency. In Dorsey v. United States, (App. Br. p. 3) the police had personal knowledge of the narcotics records of the occupants of a car parked at night at a corner notorious for drug traffic. No such circumstance was present here. United States v. Wright, (App. Br. p. 5) is not remotely analogous. No car was stopped and no person was detained. The police had actual knowledge of a crime and were led to the place of search by numerous objective clues. See also Green v. United States, (App. Br. p. 3).

None of the cases relied upon by Appellee supports the proposition that the detention of defendant and seizure of the gun and ammunition were proper. The gun and cartridges should not have been admitted into evidence.

II. The Court improperly rejected Defendant's motion for judgment of acquittal based upon self-defense.

Defendant moved for a judgment of acquittal based on the theory that the prosecution's factual case, even if fully accepted, would establish only a case of self-defense. This motion was not properly entertained, and only after its rejection did Appellant offer his defense. That the Defendant decided to testify after this ruling, and denied holding the gun at the time of the incident, does not affect the impropriety of the rejection of the earlier motion based on the reasoning that self-defense was implicit in the case as the prosecution had presented it.

III. The Court below erred in holding that the Defendant had been carrying a gun within the meaning of the Statute.

Defendant's knowledge of the presence of the gun in the car is not, without more, sufficient to show possession or constructive possession within the meaning of the Statute. Defendant was a passenger in another person's car, and there was no proof or suggestion that he had put the gun where it was, or that he had carried it into the car. Epperson v. United States (App. Br. p. 6) involved a man who was walking down the street with the plainly visible butt of a pistol sticking out

of his shirt. Epperson is palpably distinguishable from the instant case. Brown v. United States (App. Br. p. 6) is also plainly distinguishable. That case involved an instruction given by the Court in response to the following question asked by the jury: "Would it be a violation of the law if the Defendant had a pistol concealed in the automobile, though not on his person, but within his reach?" The Court answered this question in the affirmative. The jury's phrasing of the question clearly assumed that the pistol belonged to the Defendant and that he had concealed it somewhere in the car. The jury's only concern was whether possession could be construed in circumstances where the gun was not in the physical possession or on the person of the Defendant. There is no evidence in the instant case that the gun belonged to the Defendant, or that he had concealed it in the car.

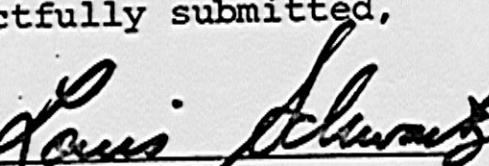
CONCLUSION

WHEREFORE, Appellant respectfully submits that the judgment of the District Court should be reversed and the case remanded to the Court below for entry of a judgment of acquittal.

Respectfully submitted,

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By:


Louis Schwartz
Counsel for Defendant
(Appointed by this Court)

CERTIFICATE OF SERVICE

I, Louis Schwartz, do hereby certify that I have on this 28th day of May, 1971, sent by First Class United States mail, postage prepaid, copies of the foregoing REPLY BRIEF FOR APPELLANT to the following:

John A. Terry
Assistant United States Attorney
United States Court House Building
3rd and Constitution Avenue, N. W.
Washington, D. C.

Louis Schwartz